

COMMERCE AND ECONOMIC GROWTH COMMISSION

OFFICE OF BUSINESS SERVICES

DIVISION OF PURCHASE AND PROPERTY

Goods and Services Contracts for Small Businesses

Jointly Adopted Emergency Rule and Concurrent Proposed Rule  
Amendments: N.J.A.C. 12A:10 and 17:13

Jointly Adopted Emergency Rule and Concurrent Proposed Rule  
Amendments Authorized by: William D. Watley, Chief Executive  
Officer and Secretary, New Jersey Commerce and Economic Growth  
Commission, and Robert L. Smartt, Deputy State Treasurer,  
Department of the Treasury

Emergency Amendment Filed: July 9, 2003

Gubernatorial Approval (N.J.S.A. 52:14B-4(c):\_\_\_\_\_

Authority: N.J.S.A. 52:18A-30(d), 52:25-1 et seq., 52:34-6 et  
seq., 52:32-17 et seq., 52:27H-6(f), 52:34-12, 10:5-36(k) and  
(o), 52:34-13, 52:27C-71 (q); 52:27C-73(a), (f) and (h); 52:27H-  
21.24; and Executive Order No. 84(1993)

Calendar Reference: See summary below for explanation of the  
exception to the calendar requirement.

Concurrent Proposal Number: \_\_\_\_\_

Emergency Adoption Effective Date: July 9, 2003

Emergency Adoption Expiration Date: September 7, 2003

Submit written comments jointly by September 3, 2003 to:

Joseph T. Grossi, Director  
Office of Business Services  
New Jersey Commerce and Economic Growth Commission  
PO Box 820  
Trenton, NJ 08625-0820

and

Hope Blackburn, Director  
Division of Purchase and Property  
Department of the Treasury

PO Box 039  
Trenton, NJ 08625-0039

This is an emergency adoption and concurrent proposal by the New Jersey Commerce and Economic Growth Commission and the New Jersey Department of Treasury to conform the existing rules implementing the Set-Aside Act with the Consent Decree in GEOD v. State of New Jersey, et al. These rules are proposed for adoption on an emergency basis and will become effective upon acceptance for filing by the Office of Administrative Law (N.J.S.A. 52:14B-4(c) as implemented by N.J.A.C. 1:30-6.5(b)). Concurrently, the provision of this emergency adoption are proposed for readoption pursuant to the normal rulemaking requirements of the administrative procedure Act (N.J.S.A. 52:14B-1 et seq. The rules become effective upon acceptance for filing by the Office of Administrative Law if filed on or prior to the emergency expiration date (N.J.A.C 1:306.5(d)).

The agency emergency adoption and concurrent proposal follows:

#### Summary

The Set-Aside Act for Small Businesses, Female Businesses, and Minority Businesses, N.J.S.A. 52:32-17 et seq. ("Set-Aside Act"), establishes a set-aside program that requires State agencies with contracting authority to make good faith efforts to award 15% of State contracts to eligible small businesses, seven percent to eligible minority businesses and three percent to eligible female businesses. The rules in this chapter are jointly promulgated by the Commerce and Economic Growth Commission ("Commerce Commission") and the Department of Treasury in order (1) to conform the existing rules implementing the Set-Aside Act with the Consent Decree in GEOD v. State of New Jersey, et al., Civ. Action No. 01-2656 (GEB), United States District Court for the District of New Jersey which, in part, permanently enjoins the State from enforcing the Set-Aside Act and its implementing regulations, N.J.A.C. 12A: 10-1.2 et seq., N.J.A.C. 12A:10A-1 et seq., N.J.A.C. 17:13-1.2 et seq., and N.J.A.C. 17:14-1.2 et seq., to the extent that the Set-Aside Act or the implementing regulations require or permit the State to set aside contracts for bidding by only minority and women owned firms ("M/WBEs"), or require or permit the State to establish contract targets or goals for State dollars paid to M/WBEs; and (2) to promote the economic prospects of the State's smallest businesses so that they can grow and expand the pool of vendors

and contractors available to provide goods and services to State agencies.

The proposed rules, N.J.A.C. 12A: 10-1.2 et seq., and N.J.A.C. 17:13-1.2 et seq., delete all references to minority and female businesses and the process of certifying these firms. They refine the definition of small business to take into account the annual gross revenues of the firm. For purposes of set-aside and subcontracting programs, small businesses will be registered in one of three categories: (1) those having gross revenues that do not exceed \$500,000; (2) those having gross revenues that do not exceed \$5 million; and (3) those having gross revenues that do not exceed \$12 million. Gross revenues will be determined on the basis of an arithmetic average over the last 3 completed tax years. In the future, the Commerce Commission may limit participation in its small business programs to businesses whose individual owners do not exceed \$750,000 in personal net worth. At least 5% of the dollar value of a State agency's contracts must be awarded to small businesses whose gross revenues do not exceed \$500,000; at least an additional 5% of the dollar value of a State agency's contracts must be awarded to small businesses whose gross revenues do not exceed \$5 million; and at least an additional 5% of the dollar value of a State agency's contracts must be awarded to small businesses whose gross revenues do not exceed \$12 million. Since the proposed rules create additional criteria for small business designation, it is possible that there will be firms having 100 or fewer employees that no longer qualify as small businesses for purposes of these regulations.

The proposed rules also formally establish a subcontracting target program that can be used by a State agency, as it deems appropriate, in lieu of or as a supplement to the set-aside program. Although the target program has long been included in the construction contracting set-aside regulations, N.J.A.C. 12A:10A-1.1 et seq., and N.J.A.C. 17:14-1.1 et seq., and although State agencies have used subcontracting targets in meeting the goods and services set-aside goal, these regulations have never reflected this practice. The subcontracting target program established in these regulations is modeled after those established in N.J.A.C. 12A:10A-1.1 et seq., and N.J.A.C. 17:14-1.1 et seq., for construction contracts. Definitions of goals and targets are provided.

Amendatory language clarifies that a business must be registered as a small business by the Commerce Commission on the date the bid or bid proposal is received and opened so as not to delay the award process. Additionally, language creating a right to an informal hearing prior to contract award if set-aside

designation is withdrawn is deleted since the timing is illogical and the standards for making such a determination are clearly set forth in the regulations.

Several other of the proposed amendments are technical in nature in that they replace references to the New Jersey Department of Commerce and Economic Development and the position of Commissioner with references to the New Jersey Commerce and Economic Growth Commission (Commerce Commission) and the position of Chief Executive Officer and Secretary (Secretary). The Department of Commerce and Economic Development was abolished by statute in 1998, and replaced by the Commerce and Economic Growth Commission. Additionally, in the definition of "State contracting agency" reference is made to various multi-state agencies.

#### Social Impact

These rules are a result of the consent decree in *GEOD v. State of New Jersey* which, in part, enjoins the state from enforcing the Set-Aside Act and the implementing regulations to the extent that the Set-Aside Act or its implementing regulations require or permit the State to set aside contracts for bidding by only minority and women owned firms, or require or permit the State to establish contract goals for State dollars paid to minority and women owned firms.

These rules are expected to positively impact the affected businesses on a long-term basis and will increase access to opportunities for all small businesses, whether they are prime contractors or subcontractors through small business programs.

The proposed new rules are designed to have the most positive social impact possible. The New Jersey Commerce and Economic Growth Commission currently classifies more than 6,000 businesses and individuals that participate in State contracting. Sufficient employment opportunities are available to these individuals through both the goods and services and construction contracts available in the State. These rules will continue to serve the basic statutory goal of the set-aside goal to ensure that small business, which are the engine of New Jersey's economy, continue to survive and grow during the current difficult economic period and thereafter. For instance, according to the U.S. Small Business Administration's 2002 profile, Small Businesses employed 1,765,697 or 51.3% of the State's 3,440,721 employees in 1999. Further, the most recent data available, which is from 1999, indicates that 98.4% of businesses in New Jersey were small businesses. New Jersey

Commerce & Economic Growth Commission in an effort to strike a balance between the constitutional requirements and the needs of small businesses and the important social goal of giving these businesses opportunities has developed these rules with that goal in mind.

#### Economic Impact Statement

The proposed new rules will continue to enhance the competitiveness and diversity of small businesses in both goods and services and construction contracts thus resulting in a positive economic impact. There will be no additional cost incurred by State agencies or affected businesses in complying with these rules. The current contracting opportunities, both in goods and service and construction in New Jersey is earmarked to generate thousands of both public and private sector jobs. These factors demonstrate the benefit of New Jersey's goods and services programs and construction programs to the State economy. By modifying these rules to comport with current constitutional requirements, it will result in greater economic opportunities for more companies. Increased competition within the State for small businesses. The economic impact on minority and female businesses whose set-asides for state goods and services contracts are being eliminated, will be limited to independently owned and operated businesses in the State that have no more than 100 full-time employees, and gross revenues that do not exceed \$12 million.

#### Federal Standards Statement

A Federal standard analysis is not required. There are no Federal requirements or standards that affect the subject of these rules.

#### Jobs Impact Statement

It is unlikely that the proposed new rules will result in any loss of jobs in the State in as much as the amount of work available is ineffective by the method of classification.

#### Agriculture Industry Impact

The proposed new rules will have no impact on the agriculture industry in the State.

#### Regulatory Flexibility Analysis

The rules proposed establish additional paperwork requirements for firms bidding on State contracts, many of which are considered small businesses as defined by the Regulatory Flexibility Act, N.J.S.A. 52:14B-16 et seq.

It is anticipated that the additional time and cost of the paperwork required by set-aside bidders will be minimal and that the public benefits of this program will outweigh the cost. The current application has approximately fourteen (14) pages, and the application pursuant to the proposed regulations will consist of approximately two (2) pages. It is therefore anticipated that applicants will spend less time and resources completing forms under the proposed regulations than is currently required and small businesses will not be required to employ professional services for the completion of the application. The subcontracting provisions applicable to State agencies have been deleted in section N.J.A.C. 12A:10A-4.1(d)/17:14-4.1(d) because they did not establish a useful program. Rather, the subcontracting aspects are better met through the target program.

#### Smart Growth Impact

Any impact with respect to the achievement of smart growth and the implementation of the State Development and Redevelopment Plan would be a result of the participation of Small Businesses on projects within designated smart growth areas.

Full text of the emergency adoption and the concurrent proposal may be found in the New Jersey Administrative Code at N.J.A.C. 17:13 and 12A:10.

Full text of the emergency adopted and concurrent proposed new rules follows:

### **CHAPTER 10.**

#### **GOODS AND SERVICES CONTRACTS FOR SMALL BUSINESSES[, MINORITY BUSINESSES AND FEMALE BUSINESSES]**

##### **SUBCHAPTER 1. PURPOSE, SCOPE AND DEFINITIONS**

12A:10-1.1 Purpose and scope

(a) The rules in this chapter are jointly promulgated by the [Department of Commerce and Economic Development] Commerce and Economic Growth Commission (hereinafter, "[Department of Commerce] Commerce Commission") and the Department of the Treasury to implement N.J.S.A. 52:32-17 et seq., and Executive Order No. 84, dated March 5, 1993, to establish a set-aside program that, in part, requires State agencies with contracting authority to make a good faith effort to award 15 percent of State contracts to eligible small businesses[, seven percent of State contracts to eligible minority businesses and three percent of State contracts to eligible female businesses]. [These] This percentage goal[s] [are] is an overall program goal[s] for each State contracting agency. State contracting agencies are expected to apply their business judgment when establishing [set-aside] subcontracting goals for individual contracts.

(b) These rules apply only to State contracts for goods and services awarded by any State contracting agency and are not applicable to the award of State contracts for construction and construction related services.

(c) Applications and questions regarding eligibility as a small business[, minority business and/or female business] should be addressed to:

[Department of Commerce and Economic Development] Commerce and Economic Growth Commission

Set-Aside and Certification Office

20 West State Street

PO Box [835] 820

Trenton, New Jersey 08625-[0835] 0820

Questions concerning the award of contracts under these rules should be directed to the State contracting agency issuing the particular contract.

## 12A:10-1.2 Definitions

(a) The words and terms used in this chapter shall have the following meanings unless the context clearly indicates otherwise:

"Bidding threshold" means the dollar limit placed on all public contracting agencies pursuant to N.J.S.A. 52:34-7 to establish when public advertisement of bids is required.

[ "Certification" means the process whereby a minority-owned business or female- owned business is authenticated for participation in State programs requiring such certification, as judged and determined by the Set-Aside and Certification Office of the Department of Commerce and Economic Development.]

"[Commissioner] Secretary" means the [Commissioner] Chief Executive Officer and Secretary of the [Department of Commerce and Economic Development] Commerce Commission or his or her designee.

"Contractor" means any party providing goods and/or services or performing or offering to perform under a contract issued by a State contracting agency.

"Cooperative purchasing" means an extension of certain State contracts awarded by the Division of Purchase and Property for the use of either local governing authorities, pursuant to N.J.S.A. 52:25-16.1 et seq., volunteer fire departments, volunteer first aid squads and rescue squads, pursuant to N.J.S.A. 52:25-16.2, county colleges, pursuant to N.J.S.A. 18A:64A- 25.9(b), State colleges, pursuant to N.J.S.A. 18A:64-60, or quasi-State agencies, pursuant to N.J.S.A. 52:27B-56.1. Such an award is made as an adjunct to an award of a contract for State agency purchases.

"Delegated Purchasing Authority" means the authority of a State agency to award contracts below the bid threshold amount pursuant to authority delegated by the Director, Division of Purchase and Property. (See N.J.S.A. 52:25-23.)

"Division of Purchase and Property" means the State agency within the Department of the Treasury which provides centralized purchasing of goods and services for other State departments, pursuant to N.J.S.A. 52:27B-56.



["Female business" means a business which has its principal place of business located in the State, is independently owned and operated and at least 51 percent is owned and controlled by women.]

"Goal" means the statutorily determined percentage of contracts awarded by each State contracting agency to eligible small businesses in order to comply with the small business provisions of the Set-Aside Act.

"Line item contract" means an award in which a specific one-time purchase of goods or services is established.

["Minority business" means a business which has its principal place of business located in the State, is independently owned and operated and at least 51 percent of which is owned and controlled by persons who are African Americans, Latinos or Asian Americans, defined as follows:

1. African American: a person having origins in any of the black racial groups of Africa.

2. Latino: a person of Mexican, Puerto Rican, Cuban, Central or South American, Caribbean Island or other Spanish culture or origin, regardless of race.

3. Asian American: a person having origins in any of the original peoples of the Far East, Southeast Asia, and Indian subcontinent, Hawaii or the Pacific Islands.]

"Multi-source contract" means a term contract awarded by the Division of Purchase and Property wherein more than one vendor is awarded a contract. The term is applicable in two situations, when defined in conjunction with the Division of Purchase and Property (see N.J.S.A. 52:34-12.1):

1. Where the volume of business is so large or the geographical distances are so great that more than one vendor is necessary to serve the State's needs; or

2. Where the differences between manufacturers' versions of a product are so significant that it is necessary to have a contract with a vendor of each product.

"Registration" means the process by which any business can have its eligibility for participation in the Commerce Commission's small [, minority and female] business [set-aside contracts]

programs determined.

"Request for Proposals" or "RFP" means the document issued by a State contracting agency to initiate an advertising bidding and contract award process. [The RFP establishes the contract's basic terms and conditions, the product and/or service specifications, and the bidding requirements which may include a set-aside provision that restricts bidding eligibility to businesses qualified as small business, minority business or female business.]

"Set-aside contract" means a contract, [or a portion of a contract when that portion is so allocated,] specifically designated by a contracting agency as exclusively being available for award to [either] a small business[, minority business or female business].

"Small business means a business which has its principal place of business in the State, is independently owned and operated, [and] has no more than 100 full- time employees, and has gross revenues that do not exceed \$12 million.

"State contracting agency" means any board, commission, committee, authority or agency of the State which possesses the legal authority to award contracts for goods and services which include the following entities except where expressly inconsistent with statutory law:

1. DEPARTMENTS:
  - Agriculture
  - Banking
  - Personnel
  - Commerce, Energy and Economic Development
  - Community Affairs
  - Corrections
  - Education
  - Environmental Protection
  - Health
  - Higher Education
  - Human Services
  - Insurance
  - Labor
  - Law and Public Safety
  - Military and Veterans Affairs
  - Public Advocate
  - State

Transportation

Treasury

2. COLLEGES:

Glassboro State College

Jersey City State College

Kean College of New Jersey

Montclair State College

New Jersey Institute of Technology

Ramapo College of New Jersey

Richard Stockton State College

Rutgers the State University

Thomas E. Edison College

Trenton State College

University of Medicine and Dentistry of New Jersey

William Paterson College of New Jersey

3. AUTHORITIES:

Board of Public Utilities

Casino Redevelopment Authority

Development Authority for Small Businesses, Minorities  
and Women's

Enterprises

Expressway Authority

Health Care Facilities Financing Authority

Highway Authority

N.J. Economic Development Authority

N.J. Educational Facilities Authority

N.J. Health Care Facilities Financing Authority

N.J. Housing & Mortgage Finance Agency

N.J. Transit Corp.

N.J. Water Supply Authority

Public Broadcasting Authority

Sports and Exposition Authority

Turnpike Authority

Urban Development Corporation

4. COMMISSIONS:

Beach Erosion Commission

Casino Control Commission

County and Municipal Government Study Commission

Election Law Enforcement Commission

Executive Commission on Ethical Standards

Hackensack Meadowlands Development Commission

N.J. Commission on Capital Budgeting & Planning

N.J. Racing Commission

North Jersey Water Supply Commission

Passaic Valley Sewer Commission

Pinelands Commission

State Commission of Investigation

5. MULTI-STATE AGENCIES:

Delaware River Basin Commission  
Port Authority of New York & New Jersey  
Delaware River Joint Toll Bridge Commission  
Delaware River Port Authority  
Delaware River and Bay Authority  
Atlantic Interstate Low-Level Radioactive Waste Compact  
Delaware Valley Regional Planning Commission  
Interstate Environmental Commission  
Palisades Interstate Park Commission  
Waterfront Commission of New York Harbor

[5]6. All other departments, colleges, authorities and commissions that are established or may be established in the future.

"Subcontractor" means a third party that is engaged by a contractor to provide all or part of the goods and/or services included in a contract with the State.

"Target" means the numerical objectives which a State contracting agency establishes, on a contract by contract basis, in order to meet its small business goal.

"Term contract" means an award made by a State contracting agency in which a source of supply for a product or service is established for a specific period of time. A term contract is generally applied when a State contracting agency:

1. Establishes a fixed unit price or discount for items to be purchased thereunder;

2. Provides for some estimated dollar volume or minimum quantities to be purchased; or

3. Provides for the rebidding of any single purchase which exceeds a specified maximum amount.

"Treasurer" means the Treasurer of the State of New Jersey or his or her designee.

"Waiver of advertising" means an award process authorized by N.J.S.A. 52:34-9 and 52:34-10, which does not require public advertisement and which is subject to approval by the State Treasurer. Whenever possible, competition is sought prior to issuance of a waiver of advertising.

12A:10-1.3 through 1.16 (Reserved)

**SUBCHAPTER 2. [SET-ASIDE] ELIGIBILITY REQUIREMENTS FOR SMALL  
BUSINESSES[,  
MINORITY BUSINESSES AND FEMALE BUSINESSES]**

12A:10-2.1 Standards of eligibility for small businesses[,  
minority businesses and female businesses]

(a)[A business may be eligible as a small business, a minority business, a female business or a portion or combination of the three.

(b)] In order to be eligible as a small business, a business must satisfy all of the following criteria:

1. The business must be independently owned and operated, as evidenced by its management being responsible for both its daily and long term operation, and its management owning at least 51 percent interest in the business.

2. The business must be incorporated or registered to do business in the State and have its principal place of business in New Jersey, defined as such when either 51 percent or more of its employees work in New Jersey, as evidenced by the payment of New Jersey unemployment taxes, or 51 percent or more of its business activities take place in New Jersey, as evidenced by its payment of income or business taxes.

3. The business must be a sole proprietorship, partnership or corporation with 100 or fewer employees in full-time positions, not including:

i. Seasonal and part-time employees employed for less than 90 days, if seasonal and casual part-time employment are common to that industry; and

ii. Consultants employed under other contracts not related to the goods and services which are the subject of the specific contract for which the business wants to be eligible as a small business.

4. The business must have gross revenues that do not exceed \$12

million.

- i. Gross revenues of a business which has been in business for 3 or more completed years means the revenues of the business its last 3 completed tax years divided by three.
- ii. Gross revenues of a business which has been in business for less than 3 complete tax years means the revenues for the period the business has been in business divided by the number of weeks in business, multiplied by 52.
- iii. Gross revenues of a business which has been in business 3 or more complete tax years but has a short year as one of those years means the receipts for the short year and the two full years divided by the number of weeks in the short year and the two full years, multiplied by 52.

(b) In addition, the Commerce Commission may limit participation in its small business set-aside programs to businesses whose individual owners do not exceed \$750,000 in personal net worth.

[(c) In order to be eligible as a minority or female business, a business must satisfy all of the following criteria:

1. The principal place of business must be in the State; and
2. At least 51 percent of the ownership of the business must be by minority or female persons; and
3. Control over the daily and long-term operations of the business must be exercised by one or more of the minority or female owners.]

[(d)] (c) Eligibility is formalized by the [Department of Commerce's] Commerce Commission's [certification and/or] registration and approval processes.

(d) Small businesses will be registered in one of the following three categories:

- i. Small businesses whose gross revenues do not exceed \$500,000; or
- ii. Small businesses whose gross revenues do not exceed \$5 million; or
- iii. Small businesses whose gross revenues do not exceed

\$12 million.

12A:10-2.2 Obligation to provide information and penalties for failure to provide complete and accurate information

(a) Applicants under these rules shall accurately and honestly supply all information required by the [Department of Commerce] Commerce Commission.

(b) When a business has been approved as an eligible small business, [minority business or female business] on the basis of false information knowingly supplied by the business and the business has been awarded a State contract or a subcontract thereto, the [ Commissioner of the Department of Commerce] Secretary, after notice and opportunity for a contested case hearing pursuant to N.J.S.A. 52:14B-10 and N.J.A.C. 1:1, shall:

1. Assess the business any difference between the contract amount and what the State's cost would have been if the contract had not been awarded in accordance with the provisions of N.J.S.A. 52:32-17 et seq.;

2. [In addition, a] Assess the business a penalty in the amount of not more than 10 percent of the amount of the contract or subcontract involved; and

3. Order the business ineligible to transact any business with a State contracting agency for a period of not less than three months and not more than 24 months.

(c) Any business approved by the [Department of Commerce] Commerce Commission as a small business[, minority business and/or female business] shall immediately apprise the [Department] Commerce Commission of any circumstances which might affect the eligibility of the business under these rules.

(d) The failure of a business to report any such changed circumstances, or the intentional reporting of false information, shall disqualify the business for inclusion on any vendors list under these rules and may subject the business to adverse action by contracting agencies and/or the Attorney General.

12A:10-2.3 [Right to hearing upon denial of contract

A bidder or contractor that is denied any contract or the right to bid on any contract because of a determination that it failed to make a good faith effort to solicit and award subcontracts to eligible minority and female businesses shall be entitled to an administrative hearing as provided by N.J.A.C. 17:12-3.1 through 3.6.] (Reserved)

12A:10-2.4 through 2.7 (Reserved)

12A:10-2.4 through 2.12 (Reserved)

### **SUBCHAPTER 3. [CERTIFICATION AND] REGISTRATION**

12A:10-3.1 [Certification and registration] Registration procedures for small businesses[, minority businesses and female businesses]

(a) [Certification procedures established by the Department of Commerce are as set forth in N.J.A.C. 12A:11. Businesses awarded contracts or subcontracts based on their eligibility as registered minority or female businesses must file an application for certification with the Department of Commerce no later than 60 calendar days after the award of the contract. In accordance with N.J.S.A. 52:27H-21.18, small businesses are not required to be certified.

(b) Registration procedures established by the [Department of Commerce] Commerce Commission are as follows:

1. Any business which seeks to register as a small business[, minority business and/or female business] must apply to the [Department of Commerce] Commerce Commission and pay any applicable fees. For these purposes, the [Department of Commerce] Commerce Commission shall prepare a Vendor Registration Form. This form shall be available from the [Department of Commerce] Commerce Commission and the State contracting agencies.



2. As part of its application to the [Department of Commerce] Commerce Commission, a business shall reasonably document its principal place of business, [and] independent status, [and, as appropriate, the] number of [its] employees, and its gross revenues. Where available, this documentation should include appropriate forms or reports otherwise submitted to or issued by State and Federal agencies, such as employee [or affirmative action] reports filed with the New Jersey Department of Labor or certificates of incorporation issued by the New Jersey Department of State.

[i.] 3. If an applicant fails to complete fully the Vendor Registration Form, registration may be delayed or denied.

[ii.] 4. If an applicant knowingly supplies incomplete or inaccurate information, the applicant shall be disqualified under these rules and may be subject to other penalties described in N.J.A.C. 17:13-2.2 (12A:10-2.2).

[3]5. When an application for registration as a small[, minority or female] business is approved by the [Department of Commerce] Commerce Commission, the [Department] Commerce Commission will issue the newly registered business an approval notice and add it to the [Department's] Commerce Commission's small[, minority or female] vendor lists.

[4]6. State contracting agencies will utilize these lists in confirming eligibility for set-aside contracts and subcontracts and in reporting progress toward established goals.

12A:10-3.2 Time for application to register as a small business[, minority business or female business]

(a) A business may apply to the [Department of Commerce] Commerce Commission at any time to be registered as a small business[, minority business or female business] and to be placed on the appropriate vendor list.

(b) If a business is to be [considered as a small, minority or female contractor or subcontractor] eligible to bid on a specific set-aside contract or participate in the subcontracting target programs for the purposes of these rules, it must [apply to the Department of Commerce for purposes of registration no later than one day prior to the deadline for bids being received

and opened by the State contracting agency] be registered as a small business by the Commerce Commission on the date the bid or bid proposal is received and opened by the State contracting agency.

12A:10-3.3 Procedures for challenging a business registered as a small business[, minority business or female business]

(a) The qualification under these rules of a business on a vendors list as a small business[, minority business or female business] may be challenged by any other business on that State vendors list or by any of the State contracting agencies subject to these rules.

1. A registration challenge shall be made in writing to the Set-Aside and Certification Office of the [Department of Commerce] Commerce Commission, setting forth the factual basis for the challenge. The [Department] Commerce Commission shall provide a copy of the challenge and a notice granting the opportunity for a hearing to the challenged business. Where a particular contract is at issue, the [Department] Commerce Commission shall also provide a copy of the challenge to the contracting agency.

2. A registration challenge to the [Department of Commerce] Commerce Commission may concern only the qualification of a business under these rules as a small business[, minority business or female business]. Any challenge to a business's qualifications to perform a contract shall be referred to the appropriate State contracting agency.

(b) When the [Department of Commerce] Commerce Commission receives a challenge, upon request of the business whose registration is at issue, the [Department] Commerce Commission shall conduct a hearing on the matter as follows:

1. The [Department] Commerce Commission shall notify all interested parties of the time and place of the hearing, and of the right to attend and be represented at the hearing.

2. The burden of proof lies with the challenger. However, the [Department] Commerce Commission may use its own resources to ascertain the validity of a challenge and the status of a business.

3. The hearing will be conducted by the designee of the

[Commissioner of the Department of Commerce] Secretary. This designee will issue a written report to the [Commissioner] Secretary within four working days following the close of the hearing.

4. At the discretion of the [Commissioner's] Secretary's designee, participants at the hearing may be permitted to file written exceptions to the hearing officer's report no later than two working days from the issuance of the report.

5. Thereafter, the [Commissioner] Secretary shall issue a final decision on the challenge and notify the parties by certified letter.

6. A challenge to a business's eligibility shall not stay the contract award process.

#### **SUBCHAPTER 4. SET-ASIDE CONTRACTING AND SUBCONTRACTING PROGRAM**

##### **12A:10-4.1 Set-aside program goals and procedures**

- (a) Each State contracting agency, consistent with its contracting authority, shall establish and administer a set-aside program which provides for at least 15 or the established goal pursuant to the Set-Aside Act, N.J.S.A. 52:32-17 et seq., whichever is greater, percent of the dollar value of its contracts [and of all subcontracts thereunder] to be awarded to eligible small businesses, as follows: [at least seven percent of the dollar value of its contracts and of all subcontracts thereunder to be awarded to eligible minority businesses and at least three percent of the dollar value of its contracts and of all subcontracts thereunder to be awarded to eligible female businesses, which shall be measured by the total dollar value of all such set-aside contracts in comparison to the total dollar value of all publicly advertised contracts awarded by the agency within a fiscal year.] (i) at least 5 percent shall be awarded to small businesses whose gross revenues do not exceed \$500,000; (ii) at least an additional 5 percent shall be awarded to small businesses whose gross revenues do not exceed \$5 million; and (iii) at least an additional 5 percent shall be awarded to small businesses whose gross revenues do not exceed \$12 million.

1. Percentages shall be measured by the total dollar value of

all such set-aside contracts in comparison to the total dollar value of all publicly advertised contracts awarded by the agency within a fiscal year.

[1] 2. The State contracting agencies shall designate specific contracts for each of the three [distinct and exclusive] set-aside categories.

[2 The State contracting agencies shall, when they deem it appropriate, designate subcontracting goals for specific contracts which have not been set aside in their entirety.]

(b) Each State contracting agency shall establish written procedures and maintain records as necessary to define, document and report its good faith efforts to attain the established set-aside contracting goals, including contracts executed under its bidding threshold, as established by N.J.S.A. 52:34-7 et seq. The set-aside procedures shall include the following provisions:

1. The State contracting agency shall review its schedule of contracting opportunities and establish a method of determining which upcoming contracts will be offered as part of the agency's set-aside program.

i. A contract may be considered suitable for set-aside whenever the contracting agency can establish a reasonable expectation that bids may be obtained from at least three qualified eligible businesses capable of furnishing the specified products or services.

ii. The designation as a set-aside contract shall be made prior to public advertisement for bids.

(c) When a State contracting agency has made a determination that a contract [in its entirety] is suitable for set-aside purposes, the following provisions apply:

1. Public advertisement of the set-aside contracting opportunity shall be consistent with the contracting agency's standard bidding procedures and may be supplemented by special notification efforts to maximize participation.

2. Invitations for bids shall be confined to either small businesses[, minority businesses or female businesses] whose gross revenues do not exceed \$500,000 or small businesses whose gross revenues do not exceed \$5 million or small businesses whose gross revenues do not exceed \$12 million, and bids from

other bidders shall be rejected.

3. The State contracting agency shall reject all bids and withdraw the designation as a set-aside contract when the agency determines that acceptance of the lowest responsive bid would result in the payment of an unreasonable price or in a contract that is otherwise unacceptable pursuant to that agency's contracting statutes and rules.

[i] 4. The State contracting agency shall notify all participating bidders of the bid cancellation, stating the reasons for the cancellation and the agency's intent to re-solicit bids on an unrestricted basis.

[ ii. Except in cases of emergency, the State contracting agency shall provide an opportunity for a hearing before contract award to address the reasons for the withdrawal of the set-aside designation. This hearing shall not be considered a contested case under the Administrative Procedures Act.]

[4] 5. The award of any contract designated as a set-aside contract shall be made in accordance with the agency's contracting statutes, rules and procedures.

[(d) When the State contracting agency has made a determination that a contract is suitable for subcontract set-aside designation, the following provisions apply:

1. The public advertisement shall include the address and telephone number of the [New Jersey Department of Commerce's] Commerce Commission's Set-Aside and Certification Office and a notice to prospective bidders that set-aside goals, or reasonable efforts as required in N.J.A.C. 17:13-4.2 (12A:10-4.2), must be met by any contractor receiving an award.

2. The RFP shall contain a standard form by which the bidder shall certify that it will comply with New Jersey laws pertaining to set-aside contracts and is aware that it is subject to criminal and civil penalties, including debarment, in the event of non-compliance.

3. The RFP shall contain a detailed notice to bidders advising the following:

i. The RFP includes a set-aside form (or forms) considered a mandatory requirement to be completed and included as a part of the bidder's proposal.

ii. Failure to complete and submit the form(s) shall be sufficient basis to deem the bid proposal non-responsive and thus subject to mandatory rejection.

iii. The set-aside form(s) completed by the bidder shall convey information in sufficient detail to permit the contracting agency to effectively assess the bidder's plan for attaining the specified set-aside goal or documenting the bidder's good faith effort to meet the set-aside goal.

4. The award of any contract subject to set-aside goals shall be made, in accordance with the State contracting agency's applicable statutes, rules and procedures, to the bidder whose proposal meets or demonstrates a good faith effort to meet the set-aside goals.]

#### 12A:10-4.2 Subcontracting target program and procedures

(a) When it deems appropriate, any State contracting agency, consistent with its contracting authority, may establish and administer a subcontracting target program in lieu of or as a supplement to the set-aside program.

(b) Each State contracting agency shall establish written procedures and maintain records as necessary to define, document and report subcontracts awarded pursuant to this program. The procedures shall include the following provisions:

1. The State contracting agency shall review its schedule of contracting opportunities and establish a method of determining which upcoming contracts are suitable for the subcontracting target program.

i. Factors to be considered when making the determination that a particular contract is suitable for inclusion in this program include, but are not limited to: the total dollar amount of the project and subcontracting opportunities on the project.

ii. The designation of a particular contract as part of the subcontracting target program shall be made prior to the public advertisement for bids or established pursuant to addenda.

(c) Nothing in these rules shall be construed as requiring or permitting a State contracting agency to depart from its statutory restrictions or documented policies governing the

percentage of a contract which may be subcontracted.

(d) The bid documents shall contain a detailed notice to bidders advising of the following:

1. The bidding package includes a] small business utilization form or forms considered a material and mandatory requirement which must be completed and included as part of the bidder's proposal.

2. Failure to complete and submit the form or forms may render the proposal non-responsive and thus subject to rejection.

3. The small business utilization plan will be used by the State contracting agency to determine, prior to award, whether the bidder's proposal is reasonably designed to meet the targets.

(e) A bidder's proposal failing to identify contracts for small businesses shall include documentation of the bidder's good faith efforts to meet the subcontracting targets. Documentation may include a record of the bidder's attempts to contract with eligible businesses and the reasons for failure to meet the subcontracting targets, or a certification that the bidder does not intend to subcontract any work.

(f) The State contracting agency shall review this documentation in order to determine whether the bidder made reasonable efforts to solicit and award contracts to eligible small businesses.

(g) The State contracting agency will consider the bidders actions taken pursuant to N.J.A.C. 17:14-4.3 (12A:10A-4.3) in determining whether reasonable efforts were made by the bidder to solicit and award subcontracts to eligible small businesses.

(h) The award of any contract pursuant to this program shall be made, in accordance with the State contracting agency's applicable statutes, rules and procedures, to the bidder whose proposal meets or demonstrates a genuine good faith effort to meet the targets.

12A:10-4.[2]3 Good faith efforts of bidders; requirements

(a) The following actions shall be taken by a bidder in

establishing a good faith effort to solicit and award subcontracts to eligible small businesses[, minority businesses or female businesses], as established in the RFP:

1. The bidder shall attempt to locate qualified potential small[, minority or female] business subcontractors;
2. The bidder shall request a listing of small[, minority or female] businesses from the State contracting agency if none are known to the bidder;
3. The bidder shall keep a record of its efforts, including the names of businesses contacted and the means and results of such contacts;
4. The bidder shall provide all potential subcontractors with detailed information regarding the specifications; and
5. The bidder shall attempt, wherever possible, to negotiate prices with potential subcontractors submitting higher than acceptable price quotes..

(b) Bidders shall maintain adequate records to document their efforts.

#### 12A:10-4.[3]4 Exemptions from set-aside program

In those circumstances where Federal law or regulations permit or require a procurement procedure other than those prescribed herein, the State contracting agency may follow the Federal procedures notwithstanding the provisions of these regulations, provided that the State contracting agency issues a written declaration that such Federal laws are in effect.

### **SUBCHAPTER 5. PLANNING, REPORTING AND REVIEW**

#### 12A:10-5.1 Planning

(a) No later than 60 calendar days before the start of each fiscal year, each State contracting agency shall submit to the [Commissioner of the Department of Commerce] Secretary a plan for the coming fiscal year to comply with the [set-aside] programs established by these rules. The [Department of



Commerce] Commerce Commission will assist any State contracting agency in the development of its plan, upon request.

1. The plan shall include a list of all known procurements and reprocurements scheduled to be bid during that fiscal year, including the following information:

i. The name of the products or services covered by the contract;

ii. The expiration date of the current contract and the estimated date of the public bid;

iii. The term or duration of the contract;

iv. The estimated dollar value of the contract or the amount expended to date on the current contract;

v. The contracts that the agency intends to set aside in each of the three small business set-aside categor[y, i.e., small business, minority business and female business] ies set forth in N.J.A.C. 12A:10-4.1 above;

vi. The contracts which have been identified as appropriate for its set-aside [subcontracting goals] programs and the contracts which have been identified as appropriate for its target programs;

vii. In addition to the requirements in i through vi above, the Division of Purchase and Property shall identify those multi-source term contracts included in the Cooperative Purchasing Program and indicate which of the multi-source contracts will be set-aside in their entirety[, entirely] and which will contain select line items set aside for small businesses[, minority businesses or female businesses].

2. Each State contracting agency, with the exception of the Division of Purchase and Property, shall include a list of those products and services typically purchased under the bidding threshold, identifying those deemed appropriate for inclusion in the [set-aside] small business programs.

i. Each State department served by the Division of Purchase and Property shall provide the Department of Commerce with a list of those products and services typically purchased pursuant to its delegated purchasing authority, or with a list of those products and services purchased during the preceding fiscal year

under that authority.

3. Each State contracting agency shall list contracts awarded as the result of Waivers of Advertising[, i.e., contracts with sole source suppliers such as water companies, gas and electric companies].

4. Each State contracting agency shall quarterly update its [set-aside] small business program plans with a list of line item contracts not included in its initial procurement schedules, containing the same information required by N.J.A.C. 17:13- 5.1(a)1 (12A:10-5.1(a)1).

5. Copies of contracting plans shall be available for review during normal business hours in the office of each State contracting agency.

(b) The [Department of Commerce] Commerce Commission shall review the plan to determine whether it is reasonably designed to achieve the State contracting agency's goal of awarding [15] 5 percent of its total contracting dollars to small businesses whose gross revenues do not exceed \$500,000, an additional 5 percent of its total contracting dollars to small businesses whose gross revenues do not exceed \$5 million, and an additional 5 percent of its total contracting dollars to small businesses whose gross revenues do not exceed \$12 million [seven percent of its total contracting dollars to minority businesses and three percent of its total contracting dollars to female businesses].

#### 12A:10-5.2 Reporting requirements

(a) Within 30 calendar days of the end of each State contracting agency's fiscal quarters, the agency shall file with the [Department of Commerce] Commerce Commission a report containing the following information prescribed by the [Department] Commerce Commission:

1. The total number and dollar value of all contracts advertised and awarded, a list of the bidders awarded contracts including the amount of the contract award, delineating which of these contracts and the percentages that were advertised and awarded as [small business, minority business or female business]set-aside contracts in each of the three categories of small businesses set forth in N.J.A.C. 12A:10-4.1;

i. The State contracting agencies, in determining compliance with the set-aside goals for the three categories, shall count only those contracts awarded as a result of set-aside designations and only for the categories designated. [For example, if an agency sets aside a contract for small businesses and the contract is awarded to a small business owned by a minority woman, that contract can be counted only as a small business award and not as a minority business or a female business award.] If a registered small business[, minority business or female business] is awarded a contract that was not set aside, that contract cannot be counted as a set-aside award but shall be counted toward attainment of the agency's overall goal.

ii. The Division of Purchase and Property shall include a list of multi-source contracts which contain lines set aside for each of the three categories of small businesses[, minority business and female business], and those contracts extended through the Cooperative Purchasing Program.

iii.

2. The total number and dollar value of all advertised and awarded contracts which included subcontract [requirements] targets, setting forth the number and dollar value of subcontracts awarded to each of the three categories of small businesses[, minority businesses and female businesses], respectively.

3. Each State department served by the Division of Purchase and Property shall report the total number and dollar value of all purchases made under its delegated purchasing authority, delineating purchases and percentages made from each of the three categories of small businesses[, minority businesses and female businesses], respectively.

4. A description of efforts made by the State contracting agency to conduct outreach and educational programs for potential eligible small businesses[, minority businesses and female businesses] and any efforts made to assist the business community in achieving the objectives of these programs.

(b) Within 90 calendar days of the close of each State contracting agency's fiscal year, the agency shall file with the [Department of Commerce] Commerce Commission, in a format prescribed by the [Department] Commerce Commission, an analysis

of actual contracting dollars paid to all contractors and actual contracting dollars paid to each of the three categories of small businesses[, minority businesses and female businesses], pursuant to set-aside contracts and subcontracts.

(c) All reports required by this subchapter shall be considered public records for the purposes of N.J.S.A. 47:1A-1 et seq. and shall be retained as part of the permanent records of the State contracting agency and the [Department of Commerce] Commerce Commission.

#### 12A:10-5.3 Annual review

The [Commissioner of the Department of Commerce] Secretary and the Treasurer of the State of New Jersey shall undertake an annual review of the operation and report to the Governor on the need for continuation or modification of the small [, minority and female] business [set-aside] programs contained in this chapter. This report shall be based upon the reports submitted to the [Department] Commerce Commission and any other information deemed appropriate. The report will include performance data on compliance and deficiencies for each contracting agency and be publicly distributed as deemed appropriate.